

**Standard Chartered Bank v Central Wood Tiles Sdn Bhd**HIGH COURT (KUCHING) — ORIGINATING SUMMONS  
NO KG 76 OF 1989HAIDAR J  
22 MARCH 1990

*Companies and Corporations — Authority of officers of company — Resolution authorizing company to acquire land free from encumbrances — Officers of transferee company executing transfer to company of land subject to existing charge — Whether chargee aware of resolution — Whether charge enforceable against transferee company — Companies Act 1965, s 20*

*Land Law — Charge by owner for benefit of another — Land transferred subject to charge — Whether a third party charge — Whether charge enforceable against transferee of land*

*Land Law — Interest — Charge over land as security for loan — Whether there was agreement to vary rate of interest — Whether chargee required to execute a memorandum of increase in rate of interest — Conversion of overdraft facility to fixed loan facility — Whether valid — Land Code (Sarawak) (Cap 81), ss 138, 146 & 148*

One Chua Beng Thian had charged a piece of land to the plaintiff as security for credit facilities granted by the plaintiff to a company called Dayasar Corp Sdn Bhd. Subsequently, Chua transferred the land to the defendant, of which he was a director, such transfer being subject to the charge, the plaintiff giving its consent thereto 'but subject and without prejudice to the rights of the chargee protected by the said charge'.

The plaintiff later applied for an order, inter alia, for sale of the land pursuant to s 148 of the Land Code of Sarawak (Cap 81). The defendant opposed the application on various grounds. The defendant contended that it had created a charge for the benefit of a third party and hence was not liable under the charge. It was also contended that the directors of the defendant had resolved to acquire the land free from all encumbrances and that Chua and one Goh Wai Lee, who had together executed on behalf of the defendant the memorandum of transfer of the land subject to the charge, had no authorization from the defendant to do so and that such action was in excess and abuse of the powers of Chua as a director of the defendant. It was also argued that the resolution was brought to the attention of the plaintiff and therefore that the plaintiff was aware that the transfer was not undertaken within the terms of the resolution. It was also agreed that the memorandum of charge did not specify interest and that there was no memorandum of variation of the rate of interest and that the memorandum of charge was not in the form required by the Code. It was also contended that the plaintiff had acted in breach of the terms of its offer to Dayasar Corp Sdn Bhd by unilaterally converting the loan to a fixed loan.

**Held**, allowing the plaintiff's application:

(1) The defendant as transferee stepped into the shoes of the transferor so long as the defendant remained the proprietor. The issue of the defendant creating a third party charge as alleged was without any merits as to accept a transfer subject to a charge was entirely different as could be seen from the clear provisions of s 138 of the Code.

(2) The plaintiff acted in good faith when it agreed to the transfer subject and without prejudice to its rights as chargee protected by the said charge without questioning whether or not

A Chua and the secretary of the defendant had the authority of the defendant to execute the instrument of transfer. The allegation that the resolution was brought to the attention of the plaintiff without being specific was only a bare allegation and without any merits at all.

(3) It was clear that the parties agreed in the memorandum of charge to the right and discretion of the chargee (ie the plaintiff) to vary the rate of interest by way of a notice in writing.

(4) According to s 146 of the Code, it shall not be necessary for the chargee to execute a memorandum of increase of the rate of interest payable under the charge. It was for the chargor (ie the defendant) to do so, and having failed to do so, the defendant could rely on its breach to defend the action.

(5) The memorandum of charge was wide enough to cover the conversion of the overdraft facility to a fixed loan facility. Further, on the evidence, the facilities were subject to review. The plaintiff had advised the defendant by letter of the conversion of the overdraft facility to a fixed loan and no evidence of the defendant disagreeing with such arrangement was adduced.

[Editorial Note: The defendant has appealed to the Supreme Court vide Civil Appeal No 02-144-90.]

**Cases referred to**

- 1 *Rolled Steel Products (Holdings) Ltd v British Steel Corp & Ors* [1985] 3 All ER 52 (distd)
- 2 *Royal British Bank v Turquand* (1856) 6 E & B 327; 119 ER 886; [1843-60] All ER Rep 435 (refd)
- 3 *ANZ Banking Group (NZ) Ltd v Gibson* [1981] 2 NZLR 513 (foldd)

**Legislation referred to**

Companies Act 1965 s 20  
Sarawak Land Code (Cap 81) ss 138, 146, 148

*P Phang* for the plaintiff.  
*Paul Tang* for the defendant.

*Cur Adv Vult*

**Haider J:** By this originating summons the plaintiff is praying for the following order:

- (a) that the land situate at Pending Industrial Estate, Kuching, Sarawak, containing an area of 8,256 sq m, more or less, and described as lot 1009, section 66, Kuching Town land district ('the defendant's land') charged to the plaintiff vide memorandum of charge instrument no L 2792/1983 registered at the Kuching Land Registry office on 11 March 1983, be sold by public auction pursuant to the provisions of s 148(2)(c) of the Land Code to satisfy the balance of the principal amount secured under the said charge with interest calculated up to 31 October 1988 totalling \$436,062.28 and further interest thereon at the rate of 13.5% pa on monthly rests from 1 November 1988 till date of full and final settlement; and
- (b) that costs of and incidental to this application be awarded to the plaintiff on a solicitor-client basis.

The plaintiff filed four affidavits in support thereof and the defendant filed five affidavits in opposition.

The following documents registered at the Kuching Land Registry office are not disputed:

- (a) Memorandum of charge instrument no L 2792/1983 registered at the Kuching Land Registry office on 11 March 1983 whereby one Chua Beng Thian @ Chua Beng Hian (BIC K 569025) charged his land, lot 1009, section 66, Kuching Town land district, containing an area of 8,256 sq m, more or less, and another, Perusahaan Getah Kuching Sdn Bhd, charged its parcel of land known as lot 1387, section 66, Kuching Town land district to the plaintiff as collateral security for facilities granted to Dayasar Corp Sdn Bhd ('the principal debtor').
- (b) Memorandum of transfer registered with the Kuching Land Registry office on 2 November 1983, the said Chua Beng Thian transferred his land (lot 1009) to the defendant, Central Wood Tiles Sdn Bhd for a consideration of \$66,090, *subject to the charge* in favour of the plaintiff for the sum of \$1,950,000 (see exh 'B' to encl 2).

It is clear that the defendant came into the scene by virtue of a memorandum of transfer of lot 1009 *subject to the charge*. It is equally clear that the defendant has no connection with Perusahaan Getah Kuching Sdn Bhd or Dayasar Corp Sdn Bhd but one thing is clear, that is, there is a common personality in the person of Chua Beng Thian as the managing director.

What then is the legal position of the defendant vis-a-vis the plaintiff as chargee as a result of the memorandum of transfer subject to the charge? The plaintiff gave the necessary consent to the memorandum of transfer 'but *subject and without prejudice to the rights of the chargee protected by the said charge*'. In this respect s 138 of the Sarawak Land Code (Cap 81) provides as follows:

In every memorandum transferring any land subject to a charge, there shall be implied the following agreement by the transferee with the transferor and, so long as the transferee shall remain the proprietor, with the chargee, that is to say, that the transferee will pay the principal sum, interest and other moneys secured by such charge at the rate and at the time or times specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum, interest and other moneys secured by such instrument and from and against all liability in respect of any of the agreements therein contained, or by this Code implied, on the part of the transferor.

Section 138 of the Land Code would seem to show clearly the position of the defendant as transferee in respect of a memorandum of transfer subject to a charge. In other words, the transferee stepped into the shoes of the transferor so long as the transferee remained the proprietor. The issue of the defendant creating a third party charge as alleged is, I think, without any merits as to accept a transfer subject to a charge is entirely different, as can be seen from the clear provisions of s 138 of the Land Code.

A The charge in respect of the land (lot 1387) was discharged by the plaintiff on the payment of \$750,000 paid by Dayasar Industries Sdn Bhd. Towards this end, a memorandum of partial discharge of charge vide instrument no L 2354/1987 was executed by the plaintiff on 12 March 1987 and duly registered at the Kuching Land Registry office on 30 March 1987 'but without prejudice to the plaintiff's rights, powers and remedies under or in respect of the residue of the said charge'. According to para 13 of the affidavit of Chua Beng Thian (encl 27), the defendant alleged that no consent was given by it to the said partial discharge. However, at the hearing of this originating summons, Mr Paul Tang, counsel for the defendant, abandoned this ground.

C The only issue is whether the plaintiff is entitled to an order for the sale of the land (lot 1009). The plaintiff submitted as follows:

- D (a) the existing memorandum of transfer subject to the charge over lot 1009 has not been discharged;
- (b) the sum of \$436,062.28 outstanding as at 31 October 1988 with further interest at the rate of 13.5% pa is still due and owing (see para 5 of the affidavit of Thomas Lai at encl 2);
- E (c) the basic requirements pursuant to s 148 of the Land Code have been fulfilled (see para 6 of the affidavit of Thomas Lai at encl 2);
- (d) there was default in the repayment of the amount outstanding by the defendant (see para 7 of the affidavit of Thomas Lai at encl 2).

F Hence, according to the plaintiff, an order for sale should rightly be made. However, the defendant relied on the following grounds in opposing the application for an order of sale of lot 1009.

#### (1) *Third party charge*

G The facts clearly showed that it is not a matter of the defendant charging its land for the benefits of a third party as such but the defendant acquiring the land in question subject to the charge and as I said earlier, the position of a transfer of land subject to an existing memorandum of charge is plainly clear by virtue of s 138 of the Land Code.

H Therefore, the contention of the defendant on the issue of third party charge is without merits at all.

#### (2) *Resolution of defendant dated 20 August 1983 regarding purchase of lot 1009*

I The defendant through the affidavit of its director, Chua Leng Khian (encl 32), at para 6 produced the minutes of the meeting of its board of directors (exh 'CLK-11') wherein it was resolved that the defendant acquired lot 1009 for a sum of \$66,090 free from all encumbrances. It is not disputed that Chua Beng Thian is both the managing director of the defendant as well as Dayasar Industries Sdn Bhd and also the registered proprietor of lot 1009.

What the defendant is saying now is that in the face of the resolution passed by the defendant as per exh 'CLK-11', Chua Beng Thian and Goh Wui Lee had no authorization from the defendant to execute the memorandum of transfer of lot 1009 subject to a charge of \$1,950,000 in favour of the plaintiff. In respect of the challenge by the defendant on the validity of the charge in respect of the transfer of lot 1009, Miss Phang, counsel for the plaintiff, submitted that the simple solution to this 'issue' is provided by s 20 of the Companies Act 1950 which reads:

(1) No act or purported act of a company (including the entering into an agreement by the company and including any act done on behalf of a company by an officer or agent of the company under any purported authority, whether express or implied of the company) and no conveyance or transfer of property, whether real or personal to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act or to execute or take the conveyance or transfer.

(2) Any such lack of capacity or power may be asserted or relied upon only in:

- (a) proceedings against the company by any member of the company or, where the company has issued debentures secured by a floating charge over all or any of the company's property, by the holder of any of those debentures or the trustee for the holders of those debentures or restrain the doing of any act or acts or the conveyance or transfer of any property to or by the company;
- (b) any proceedings by the company or by any member of the company against the present or former officers of the company; or
- (c) any petition by the Minister to wind up the company.

Mr Paul Tang, counsel for the defendant, on the other hand submitted that the transfer of lot 1009 from Chua Beng Thian to the defendant was in excess and an abuse of the powers of Chua Beng Thian as a director of the defendant. According to Mr Paul Tang, the excess or abuse of the powers is clearly evidenced by the resolution of the directors of the defendant (exh 'CLK-11') where it was specifically resolved that:

- (a) the defendant acquired lot 1009 for a price of \$66,090 free from encumbrances;
- (b) the transfer is subject to and be in accordance with the provisions of the memorandum of articles of association of the company.

Towards this end, Mr Paul Tang quoted cl 22 of the memorandum of association and art 77(A) of the articles of association. Clause 22 reads:

To borrow or raise or secure the payment of money by mortgage, or by the issue of debentures or debenture stock, perpetual or otherwise, or in such other manner as the company shall think fit, and for the purposes aforesaid or for any other lawful purpose to charge all or any of the company's property or assets, present and future, including its uncalled capital and collaterally or further to secure any securities of the company by a trust deed or other assurance.

A Article 77(A) reads:

The directors may borrow or raise from time to time for the purposes of the company or secure the payment of such sums as they think fit, and may secure the repayment or payment of any such sums by mortgage or charge upon all or any of the property or assets of the company or by the issue of debentures (whether at par or at a discount or premium) or otherwise as they think fit.

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Clause 22 and art 77(A) may appear to be not independent powers but ancillary powers, ie the powers must be exercised for the purpose of the defendant but in my view, on the facts of the present case, cl 22 and art 77(A) may not be the relevant provisions for consideration here. We are not dealing here with the powers of borrowing or raising of money, etc but it is essentially of acquisition of property by the defendant. In my view, cll 20 and 21 would appear to be the relevant provisions (see exh 'CLK-9'). Clause 20 reads:

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To purchase, take on lease or in exchange, hire or otherwise acquire, any real or personal property, patents, licences, rights or privileges which the company may think necessary or convenient for the purposes of its business, and to construct, maintain and alter any buildings or works necessary or convenient for the purposes of the company.

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Clause 21 reads:

To pay for any property or rights acquired by the company, either in cash or fully or partly paid shares, or by the issue of securities, or partly in one mode and partly in another, and generally on such terms as may be determined.

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The facts of the case of *Rolled Steel Products (Holdings) Ltd v British Steel Corp & Ors*<sup>1</sup> relied on heavily by Mr Paul Tang are different from the facts of the present case and are therefore distinguishable. Be that as it may, it would appear that the defendant is competent to acquire property real or personal generally on such terms as may be determined, and the acquisition of lot 1009 must therefore

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be for the benefit of the defendant except that lot 1009 is encumbered with the charge to the plaintiff. The real issue is whether Chua Beng Thian as managing director of the defendant is empowered to acquire and execute the memorandum of transfer of lot 1009 subject to the charge on behalf of the defendant in the face of the resolution (CLK-11) made by the board of directors of the defendant in which Chua Beng Thian was a party. It would appear to me from the resolution (CLK-11) that Chua Beng Thian did not disclose that lot 1009 belonged to him personally when the board considered the acquisition of lot 1009 for a consideration of \$66,090. According to exh 'CLK-10',

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lot 1009 is valued at \$1,500,000 and would anyone sell such valued land for \$66,090 without 'any catch'? Is it expected of the court to believe or accept that the defendant (through its directors) was so naive as to purchase lot 1009 for \$66,090, ie about 23 times below the market value? It is difficult to accept. It may well be true that according to *Rolled Steel Products Ltd v British Steel Corp*

& Ors,<sup>1</sup> the rule in *Royal British Bank v Turquand*,<sup>2</sup> is not absolute and unqualified when Slade LJ said at p 77:

This connection might well have been unanswerable if the rule in *Royal British Bank v Turquand* (1856) 6 E & B 327; [1843-60] All ER Rep 435 were an absolute and unqualified rule of law, applicable in all circumstances. But, as the statement of the rule quoted above indicates, it is not. It is a rule which only applies in favour of persons dealing with the company in good faith. If such persons have notice of the relevant irregularity, they cannot rely on the rule.

According to exh 'TL1', Chua Beng Thian informed the plaintiff that the Land and Survey Kuching approved the transfer of lot 1009 to the defendant and he requested the plaintiff for the agreement of the transfer under the same terms and conditions as previously agreed. Chua Beng Thian further informed the plaintiff that he is the major shareholder and managing director of the defendant. The defendant executed the memorandum of transfer through Chua Beng Thian and the secretary of the defendant and the seal of the defendant was used. In view of these facts and the documents, the plaintiff, in my view, acted in good faith when it agreed to the transfer subject and without prejudice to its rights as chargee protected by the said charge without questioning whether Chua Beng Thian and the secretary of the defendant had the authority of the defendant or not to execute the said transfer. In this respect *Charlesworth & Cain on Company Law* (11th Ed) at p 412, said:

A company is bound by the acts of its agent within his actual authority, express or implied. As to express actual authority, an individual director may be specifically authorized by the board of directors to make a particular contract on behalf of the company. As to implied actual authority, a director may, under a power in the articles, be appointed to an office, eg that of managing director, which carries with it authority to make a contract on behalf of the company.

In respect of a seal of a company, *Gower's Principle of Modern Company Law* (4th Ed) stated as follows:

For example, it is customary to provide that documents shall be sealed in the presence of not the whole board, but one or more directors and the secretary. If, therefore, the third party receives documents sealed in the presence of the appropriate individuals as stated in the articles of association, he is entitled to rely on its formal validity. Even if the board had never resolved that the documents be sealed, he will be protected for he is not entitled to see the minutes of the board meeting which relate to the matter of 'indoor management' and has no means of checking whether the internal regulations have been complied with.

It is therefore appropriate for the plaintiff to accept Chua Beng Thian and the secretary as having the authority to execute the transfer without any question.

The allegation of the defendant that the resolution was brought to the attention of the plaintiff without being specific is to my mind only a bare allegation and without any merits at all. If the defendant is serious in its allegation it should have written an official letter to the plaintiff

A bringing to its attention the resolution of the defendant. Without being specific the plaintiff would be in no position to rebut such allegation especially such allegation coming from Chua Beng Thian (see para 3 of his affidavit at encl 31) when he was the one who executed the memorandum of transfer on behalf of the defendant. It is difficult to swallow his statement that he brought to the attention of the plaintiff about the resolution and the plaintiff did not say anything!

B The defendant further tried to rely on two other grounds to oppose this originating summons, namely:

- C (a) that the memorandum of charge did not specify interest and that there is no memorandum of variation of increase of interest and that the memorandum of charge is not in the form required by the Land Code; (b) that the plaintiff has breached the terms of its offer to Dayasar Corp Sdn Bhd, by unilaterally converting the loan to a fixed loan.

D An examination of the memorandum of charge itself (exh A) will show 'interest at the rate of 13.5% pa or such other rate or rates as shall be fixed from time to time by the chargee' is clearly stated. As regards the contention of the defendant that there is no memorandum of variation of charge, the documents 'CLK 12 to CLK 16' speak for themselves. E As regards the increase in the rate of interest, it is clearly provided in the memorandum of charge at p 3 thereof thus:

F And the chargors hereby agree that notwithstanding the rate of interest hereinbefore mentioned, the chargee may from time to time serve on the chargors notice in writing requiring payment of interest at an increased rate of interest and upon receipt of the said notice the increased rate of interest shall be charged....

G It is clear that the parties agreed in the memorandum of charge to the right and discretion of the chargee (ie the plaintiff) to vary interest by way of a notice in writing (see *ANZ Banking Group (NZ) Ltd v Gibson*<sup>3</sup>). Miss Phang, counsel for the plaintiff, submitted that according to *Torrens System in Australia* by Whalan, in respect of prescribed forms, it is stated 'the general rule is that the use of the prescribed or authorized forms is obligatory, but variations in the forms sanctioned by the registrar or variations by the parties that are not ones of substance are permissible'. In any event, according to s 146 of the Land Code, it shall not be necessary for the chargee to execute a memorandum of increase of the rate of interest payable under the charge. It is for the chargor (ie the defendant) to do so and having failed to do so, he cannot, in my view, rely on its breach to defend this action.

I As regards the contention of the defendant that the plaintiff as per the terms of the memorandum of charge had no right to unilaterally convert the overdraft facility of \$450,000 to fixed loan facility, in my view, the memorandum of charge is wide enough to cover such action of the

plaintiff as the memorandum of charge refers to 'credit facilities' which may be in the form of overdraft, fixed loan etc and the amount due and owing falls squarely within the ambit of the memorandum of charge. Further, the terms of the letters of offer as per exhs 'CLK-13' to 'CLK-16' clearly state that the facilities are subject to review. In any event, the letter of the plaintiff (exh 'CLK-17') advised the conversion of the overdraft facility to a fixed loan and in the event of any disagreement shown of the arrangement as per 'CLK-17' it would show that such arrangement was accepted as no evidence was adduced of disagreement to such arrangement.

In the circumstances, I am of the view that the proper order that should be made is to make an order in terms of the originating summons filed by the plaintiff herein and I do so order.

*Application allowed.*

Solicitors: Reddi & Co Advocates; Ibrahim & Co Advocates.

Reported by PS Ranjan

## Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING  
SUMMONS NO S5-31-3640-88  
NH CHAN J  
22 MARCH 1990

*Companies and Corporations — Loans to directors — Company prohibited from guaranteeing or securing loan — Director of company taking loan from third party — Loan secured by charge over company's lands — Whether charge illegal and void — Whether registration of charge may be cancelled for illegality — Companies Act 1965, ss 67 & 133*

A director of the plaintiff, which was a private company, took a loan from the defendant, a co-operative society. The loan was secured by a charge on the plaintiff's lands in favour of the defendant. The plaintiff later applied to the court for an order declaring that the charge was void and unenforceable for contravening s 133 of the Companies Act 1965 ('the Act') which, inter alia, prohibited a company from entering into a guarantee or providing any security in connection with a loan made to a director of the company by any other person. The company also sought an order for the cancellation of the registration of the charge and also for the return of all documents of title to the lands.

**Held**, allowing the plaintiff's application:

(1) Any agreement made in breach of any of the prohibitions in s 67 or s 133 of the Act is illegal, so as to expose the company's officers to penalties. Although s 67 and s 133 do not expressly say that the prohibited transactions are void, this necessarily follows from the fact that the prohibited transactions are made illegal by the Act by subjecting the officers of the company to penalties. The third party charge which was created

A by the plaintiff company in favour of the defendant co-operative society to secure an illegal loan made by the co-operative society to a director of the plaintiff company was illegal and therefore void and unenforceable by the co-operative society as it had contravened the prohibition in s 133 of the Companies Act 1965 on this type of transaction.

B (2) The general rule is that a party cannot recover what he has given to the other party under an illegal transaction but there are exceptions to the rule. The plaintiff's case came within one of the exceptions comprising cases in which the contract or transaction is made illegal and void for the protection of a particular class of the community of which the plaintiff is a member. In such a case, the plaintiff will be permitted to recover.

C (3) Section 133 of the Act (or for that matter s 67) was passed to protect the company from having its assets depleted through misuse and not only to protect its creditors and shareholders. The charge transaction in the present case was made illegal and therefore void by virtue of s 133 of the Act.

D [Editorial Note: The defendant's appeal to the Supreme Court vide Civil Appeal No 02-161-89 was withdrawn on 23 April 1990 and the court (comprising Abdul Hamid LP, Harun Hashim and Ajaib Singh SCJJ) dismissed the appeal and ordered that the security sum of \$50,000, interest accrued thereon and deposit of \$500 in court be paid forthwith to the plaintiff. This gross sum awarded in lieu of taxation was given by the Supreme Court under O 59 r 9(4)(b)(ii) of the Rules of the High Court 1980.]

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### Cases referred to

- 1 *Heald v O'Connor* [1971] 2 All ER 1105; [1971] 1 WLR 497 (folld)
- 2 *Wallersteiner v Moir* [1974] 1 WLR 991 (folld)
- 3 *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 1 WLR 1555 (refd)
- F 4 *Dressy Frocks v Bock* (1951) 51 SR (NSW) 390 (folld)
- 5 *DJE Constructions v Maddocks* (1981-1982) 6 ACLR 171 (folld)

### Legislation referred to

- Companies Act 1965 ss 67, 133  
Companies Act 1948 [UK] s 54, 190  
Companies Act 1980 [UK] ss 49, 52  
G Companies Act 1981 [UK] ss 42-44  
Companies Act 1985 [UK] ss 151-158, 330, 341  
Companies Code 1981 [Aust] ss 129, 130, 230  
Uniform Companies Act 1961 [Aust] ss 67, 125

*Hira Singh (Asbir Kaur Sangha and Manprit Kaur Sangha with him) for the plaintiff.*

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*Cecil Abraham (S Suhendran with him) for the defendant.*

*Cur Adv Vult*

NH Chan J: The plaintiff is a private company. The defendant, which is now under receivership, is a co-operative society registered under the Co-operative Societies Act 1948. The name is misleading; it is not a bank at all. On 7 April 1986, a member of the defendant co-operative society, who was also a director of the plaintiff company, took a loan of \$20m from the defendant co-operative society. The loan was secured by a charge on the plaintiff company's lands in favour of the defendant co-operative society as chargee.

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